11-1-2012

Third Place: The State of Florida v. Joelis Jardines

Cassandra Shryock

Kaitlin Keohane

No. 11-564

IN THE
SUPREME COURT OF THE UNITED STATES

FALL TERM 2012

THE STATE OF FLORIDA,
Petitioner,

v.

JOELIS JARDINES,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

November 1, 2012
Round #1, 6:00 p.m.

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QUESTIONS PRESENTED

I. Is a warrantless dog sniff search at the front door of a private home, which necessarily reveals intimate details of the home, a "search" under the Fourth Amendment?

II. Since a dog sniff search is not a minimally intrusive search, can a warrantless dog sniff search of a home be performed with a showing of anything less than probable cause, absent exigent circumstances?

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OPINIONS BELOW

The opinion below is reported at *Jardines v. Florida*, 73 So. 3d 34 (Fla. 2011). The opinion of the Third District Court of Appeal of Florida is reported at *Florida v. Jardines*, 9 So. 3d 1 (Fla. Dist. Ct. App. 2008).

STANDARD OF REVIEW

The question of whether reasonable suspicion or probable cause applies to make a warrantless search should be reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 691 (1996). A *de novo* standard of review allows this Court to unify precedent and provide law

enforcement officers with a defined set of rules to make the correct determination as to whether an invasion of privacy is justified. *Id.* at 697-98. Accordingly, the questions of whether or not a warrantless dog sniff search of a home is a search under the Fourth Amendment, and whether a dog sniff requires an evidentiary showing of probable cause, should be reviewed *de novo*.

STATEMENT OF THE CASE

Statement of the Facts

On December 5, 2006, members of the Miami-Dade Police Department and the Drug Enforcement Agency surrounded Respondent, Mr. Joelis Jardines' home. (J.A. 109.) They did so in response to an unreliable, anonymous tip they received over a month earlier. (J.A. 16.) The tip merely alleged that the residence located at 13005 SW 257th Terrace was being used as a marijuana grow house. (J.A. 16.) The tip did not specify whose home it was, how the tipster obtained this information, and provided no specific details that could be corroborated by law enforcement. (J.A. 16.)

Detective William Pedraja ("Pedraja"), of the Miami-Dade Police Department's Narcotics Bureau, was one of the multitude of narcotics agents and law enforcement officers who had surrounded the home. (J.A. 8-9, 16.) Pedraja, whose affidavit was ultimately used to obtain a search warrant of Mr. Jardines' home, initially observed no unusual activity at the home. (J.A. 8-9.) Detective Doug Bartelt ("Bartelt"), also of the county Narcotics Bureau, subsequently approached Mr. Jardines' home with the drug detecting canine, "Franky." (J.A. 9.) Bartelt approached the archway enclosing the front door, with Franky on a six-foot leash. (J.A. 35.) Franky began bracketing, performing a sniff search of the home. (J.A. 9.) Franky then alerted to Bartelt, indicating the possible presence of narcotics. (J.A. 9.) Historically, Franky alerted to the presence of narcotics only 60% of the time. (J.A. 9.)

After the alert, Pedraja approached Mr. Jardines' front door and stated that he detected the scent of marijuana. (J.A. 9.) However, Bartelt later testified he only smelled mothballs when he had approached the door. (J.A. 55.) Only after the dog sniff search occurred, did Pedraja note that the air conditioning was running inside the home. (J.A. 9.) Pedraja next prepared an affidavit and obtained a search warrant to enter Mr. Jardines' home, based on the dog sniff search. (J.A. 39.) Pedraja admitted he did not take any additional measures, including subpoenaing Mr. Jardines' electricity records, to determine whether the residence was actually being used as a grow house. (J.A. 41-44.) The law enforcement officers executed the search warrant and subsequently arrested Mr. Jardines. (J.A. 17.)

Procedural History

The State of Florida charged Joelis Jardines with Trafficking in Cannabis and Grand Theft based on physical evidence obtained during a search of Mr. Jardines' home and Mr. Jardines' subsequent confession. (J.A. 3, 17.) Before trial, Mr. Jardines moved to suppress the items seized at his home during the search on December 6, 2005. (J.A. 16.) The evidence was suppressed on the grounds that the use of a highly trained, narcotics detection canine constituted an unreasonable search, and without the drug detector canine's alert, law enforcement lacked probable cause for a warrant to search Mr. Jardines' home. (J.A. 136.)

The State of Florida appealed the decision to the District Court of Appeal of Florida, Third District. *Jardines*, 9 So. 3d at 2. The appellate court reversed the trial court's ruling, and held that the use of a highly trained narcotics detection canine was not a search, and thus the warrant to search Mr. Jardines' home was based on probable cause. *Id.* Moreover, the court determined that any evidence obtained during the search was also admissible under the "inevitable discovery" doctrine. *Id.*

Mr. Jardines sought review of this decision in the Florida Supreme Court. *Jardines*, 73 So. 3d at 38. The Florida Supreme Court reversed the lower court's ruling, and concluded that a "sniff test" is a search within the meaning of the Fourth Amendment which requires a showing of probable cause, rather than reasonable suspicion. *Id.* at 36-37.

Petitioner filed a motion for writ of certiorari with this Court, which was granted on January 6, 2012. (J.A. 144.)

SUMMARY OF ARGUMENT

A dog sniff of a home is a search under the Fourth Amendment for the following three reasons: first, it infringes on individuals expectation of privacy in their home; second, narcotics detection canines are a form of sense-enhancing technology, that when used on a home, constitutes a search; and finally, a physical intrusion on to the curtilage of a home is a search under the Fourth Amendment. First, individuals have a reasonable expectation of privacy in their homes. The home is afforded the most heightened protection under the Fourth Amendment, more so than cars and pieces of luggage. This expectation of privacy is infringed on when the government uses a highly trained, narcotics detection canine to sense the intimate details of the interior of the home. Next, highly trained, narcotics detection canines are a form of sense-enhancing technology, because they allow law enforcement officers to detect things that they would not be able to with their natural human senses. Thus, when these dogs are used on a home, it also constitutes a search. Lastly, the narcotics detection canine in this case physically trespassed onto the curtilage of Mr. Jardines' home when he performed the sniff search. As the curtilage of a home is protected to the same extent as the interior of the home, a search of Mr. Jardines' home occurred in this case.

As a dog sniff search is a search under the Fourth Amendment, this Court should require a warrant supported by probable cause to initiate a dog sniff search of a home. Any search of a home requires probable cause, and thus, a dog sniff search should be no different. This is consistent with the Fourth Amendment and this Court's jurisprudence, which requires probable cause for general evidentiary searches. When a home is sniffed searched by a highly trained, narcotics detection canine, there is no compelling governmental interest that outweighs the individual's interest in keeping the details of their home private. Permitting a lesser showing than probable cause would effectively eviscerate the protections of the Fourth Amendment.

In this case, the uncorroborated, anonymous tip does not have the indicia of reliability to support a search based on probable cause. Accordingly, the officers here abused their discretion by performing a warrantless dog sniff search of Mr. Jardines' home.

ARGUMENT

I. A DOG SNIFF SEARCH AT THE FRONT DOOR OF A PRIVATE HOME, BY A HIGHLY TRAINED NARCOTICS DETECTION CANINE, IS A SEARCH UNDER THE FOURTH AMENDMENT.

A dog sniff search at the front door of a private home, by a highly trained narcotics detection canine, is a search under the Fourth Amendment because it infringes on an individual's reasonable expectation of privacy in their own home. Eliminating the warrant requirement for a dog sniff search of a home leaves nothing left for the Fourth Amendment to protect. The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches of individuals' persons, papers and effects are already permitted in certain circumstances. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting warrantless searches of individuals for weapons); *California v. Acevedo*, 500 U.S. 565 (1991) (permitting warrantless

searches of cars, and containers in cars, when law enforcement has probable cause). Florida asks this Court to eradicate the only remaining element wholly protected against warrantless searches by the government: an individual's home. Permitting warrantless dog sniff searches would effectively eviscerate the rights of individual citizens protected by the Fourth Amendment.

In discerning what constitutes a search, this Court must interpret the Fourth Amendment "in a manner which will conserve . . . the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). A search occurs when an individual's expectation of privacy is infringed upon, if the individual has an actual, subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A search also occurs where "the government obtains information by physically intruding on a constitutionally protected area." *United States v. Jones*, 132 S. Ct. 945, 960 n.3 (2012) (holding that attaching a tracking device to the undercarriage of a vehicle encroached on a protected area). Whether applying either the reasonable expectation of privacy test from *Katz*, or the physical trespass test from *Jones*, a dog sniff search of a home is an unreasonable search under the Fourth Amendment because a dog sniff search reveals intimate details of the home that would otherwise not be known by police.

A. Mr. Jardines Had a Reasonable Expectation of Privacy in His Home Because the Home Is the Most Protected Area in Fourth Amendment Jurisprudence.

The Fourth Amendment draws "a firm line at the entrance to the house," *Payton v. New York*, 445 U.S. 573, 590 (1980), which a dog sniff search necessarily crosses. At the heart of the Fourth Amendment "stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). Recognizing that the home is where "privacy expectations are most heightened," *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 (1986), this Court has emphatically and consistently declared

that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The warrantless dog sniff search at issue here was not aimed at detecting the odors on the exterior of Mr. Jardines' home; rather it was intended to reveal whether or not contraband was on the *interior* of the home. Therefore, the warrantless dog sniff search of Mr. Jardines' home infringed on his reasonable expectation of privacy in the interior of his home, thus violating the Fourth Amendment.

1. Mr. Jardines had a reasonable expectation of privacy in the smells emanating from his home.

Mr. Jardines had a reasonable expectation of privacy in the interior of his home, which should extend to the air and odors that unintentionally escape from the home. Individuals have a reasonable expectation of privacy in what they seek to preserve as private, even if it is accessible to the public. *Katz*, 389 U.S. at 351. Although the Fourth Amendment has never "require[d] law enforcement to shield their eyes when passing by a home on public thoroughfares," *Ciraolo v. California*, 476 U.S. 207, 213 (1986), a dog sniff search goes much farther, detecting scents that are neither purposefully, nor knowingly, exposed to the public. This Court's precedent has long recognized that there is a minimum, reasonable expectation of privacy that exists in the interior of the home. *Kyllo*, 533 U.S. at 28. Therefore, it can be inferred that every individual has an expectation of privacy in the interior of their home, and that expectation is one society recognizes as reasonable.

This expectation of privacy should extend to the odors of a home because, although a dog sniff search may only reveal the odors emanating from the home, "a thermal imager captures only heat emanating from a house . . . [and] a powerful directional microphone picks up only sound emanating from a house." *Kyllo*, 533 U.S. at 35. Still, this Court emphatically stated the

use of these technologies would constitute a search. *Id.* at 38-40; *Katz*, 389 U.S. at 359. Thus, it follows that if individuals have a reasonable expectation of privacy in the sounds and heat emanating from their home, they must also have a reasonable expectation of privacy in the smells emanating from their home. Furthermore, in *Kyllo*, this Court rejected the notion that the thermal imager only detected heat escaping the house, something that was already revealed to the public, and thus did not constitute a search. 533 U.S. at 35-36. Instead, this Court held that it was irrelevant whether or not the thermal imager detected heat escaping from the home, or heat within the home: either way it revealed intimate details from within the home, and was therefore a search. *Id.* at 36.

Moreover, the officers here were "engaged in more than naked-eye surveillance of the home." *See id.* at 33. Mr. Jardines did not purposefully, or knowingly, expose the odors of the interior of his home to the public. As such, he did not "assume the risk" that the contents of his home would be revealed, and thus maintained his expectation of privacy. *Cf. Smith v. Maryland*, 442 U.S. 735, 744 (1979) (holding an individual reveals the numbers he or she dials to the telephone company and thus assumes the risk it will be revealed to others as well). Detective Pedraja could not see what was in Mr. Jardines' home because the blinds were drawn. (J.A. 9.) Instead, he required the use of highly trained narcotics detecting canine to "see" into Mr. Jardines' home for him. Thus, law enforcement officers are not being asked to shield their eyes, but merely to rely on their human senses. Even if a dog sniff search only detects odors on the exterior of the home, the dog's sense of smell still crosses the firm line of Fourth Amendment protection. Accordingly, Mr. Jardines' reasonable expectation of privacy in his home was infringed upon.

2. A dog sniff search of a home is distinguishable from dog sniff searches of luggage or cars.

This Court has held that in certain, limited circumstances a dog sniff search is not a "search" within the ambit of the Fourth Amendment. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405 (2005) (finding a dog sniff search of a car lawfully pulled over for traffic violation was not a search); *Indianapolis v. Edmond*, 531 U.S. 32 (2000) (finding a dog sniff search of a car at drug check point was not a search); *United States v. Place*, 462 U.S. 696 (1983) (finding a dog sniff search of luggage at the airport was not a search). However, a dog sniff search of a private home is categorically different than a dog sniff search of a piece of luggage or a car, because individuals, including Mr. Jardines, have a much greater expectation of privacy in their homes.

"The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 27. Even assuming, *arguendo*, that detection dogs only detect contraband, that is irrelevant: "[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. When an individual drives a car on a public highway, or takes a piece of luggage to an airport, they assume the risk that they may be stopped and that their possessions may be subjected to a physical inspection. Furthermore, this Court has explicitly stated that individuals do not have the same expectation of privacy in a car or piece of luggage as they do in their home. *California v. Carney*, 471 U.S. 386, 405 (1985) (stating a citizen has a much greater expectation of privacy in the interior of a mobile home than a piece of luggage[1]); *Illinois v. Rakas*, 439 U.S. 128, 148 (1978) (holding that cars should not be treated the same as homes for Fourth Amendment purposes).

[1] This Court continued that the reasonable expectation of privacy an individual has in a mobile home that is parked, is the same as the reasonable expectation of privacy one has in a traditional home. *See Carney*, 471 U.S. at 405.

Accordingly, the Second Circuit refused to permit a warrantless dog sniff search of an apartment, because the defendant had a "heightened expectation of privacy inside his dwelling." *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985). Although, several Courts of Appeals have held that a dog sniff search of a home is not a "search" within the ambit of the Fourth Amendment, these courts relied heavily on the faulty reasoning in *Caballes* and *Place*.[2] *See United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010) ("The Supreme Court has treated narcotics dog sniffs as '*sui generis*.' We see no reason to do otherwise."); *United States v. Brock*, 417 F.3d 692, 695 (7th Cir. 2005). In this case, Mr. Jardines unquestionably had a reasonable expectation of privacy in his home, which Franky infringed upon when he performed the sniff search. Thus, in keeping with the traditional sanctity afforded to the home, any warrantless dog sniff search of a home, including the search that occurred here, is a search in violation of the Fourth Amendment.

B. A Highly Trained, Narcotics Detection Canine is a Form of Sense-Enhancing Technology, That, When Used on a Home, Constitutes a Search Under the Fourth Amendment.

A highly trained, narcotics detection canine is a form of sense-enhancing technology which, when used on a home, infringes on an individual's reasonable expectation of privacy in their home. When it comes to the home, if "the government uses a device that is not in general public use, to explore the details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40 (finding that the use of a thermal imager to detect the relative heat of a home was an illegal search). Thus, a search occurs when (1) sense-enhancing technology is used (2) to obtain information regarding the interior of the home (3) that could not

[2] This Court in *Caballes* and *Place* reasoned that dog sniffs *only* detected the presence or absence of contraband, which has now been demonstrated to be inaccurate: narcotics detection dogs in fact alert to the by-products of contraband, which are also present in legal items. *See* discussion in I(B)(1) and II(A).

have otherwise been obtained without physical intrusion into the home and (4) the sense-enhancing technology is not in general public use. *Id.* at 34. The use of a highly trained, narcotics detection canine like Franky, on a home, is a search under these criteria.

1. Franky and other highly trained, narcotics detection canines are sense-enhancing technology.

Franky and other highly trained, narcotics detection canines are able to detect an array of items that law enforcement officers would otherwise be incapable of detecting. A law enforcement officer's use of any detection dog, "is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but a significant enhancement accomplished by a different, far superior, sensory instrument." *Thomas*, 757 F.2d at 1367. Not only do highly trained, narcotics detection canines alert to ordinary household products, such as solvents, insecticides, and perfumes, but they also may alert to currency that is contaminated with drugs. Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 839-40 (2009). A law enforcement officer would not be able to tell if any of these things were present in a home using their own natural, human senses without the assistance of these "far superior, sensory instruments." Accordingly, Franky, and other narcotics detection canines are a form of sense-enhancing technology, analogous to a thermal imager. *See Kyllo*, 533 U.S. at 40.

2. Franky provided law enforcement officers' with information about the details of Mr. Jardines' home.

Highly trained, narcotics detection canines, like Franky, provide law enforcement with a glimpse into the interior of the home. While "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest," *Caballes*, 543 U.S. at 408 (internal citation omitted), detection dogs detect more than merely the presence or absence of

contraband. *See* Lunney, *supra*, at 839-40. These dogs reveal a wide range of information that is not exposed to the public, including whether or not perfume or currency is in the home. *Id.* Although these may seem like minor or insignificant details, this Court has held that even someone leaving a light on is an intimate detail of the home, protected by the Fourth Amendment. *See Kyllo*, 533 U.S. at 37-38. In effect, these dogs allow law enforcement officers to "see" through the walls of the home and into an individual's most private domain. No matter what Franky, or any other narcotics detection canines reveal about the interior of a home, they are intimate details that the Fourth Amendment intended to keep private until the government had probable cause to obtain a warrant.

3. Highly trained, narcotics detection canines provide law enforcement with information that would otherwise be unknowable without a physical intrusion into the home.

Without Franky, the details of the interior of Mr. Jardines' home would not have been known to law enforcement without a physical intrusion into the home. Detectives Bartelt and Pedraja were not able to see what was in Mr. Jardines' home because Mr. Jardines had his blinds drawn. (J.A. 9.) They required the use of a highly trained, narcotics detection canines to peer into the home for them. Although Detective Pedraja claims to have also smelled marijuana at Mr. Jarindes' front door, Detective Bartelt stated he did not smell marijuana. (J.A. 36, 55.) Furthermore, since Detective Pedraja did not claim to smell marijuana until after Franky's alert, (J.A. 36.), there is no way to tell if he would have detected the scent independently of Franky's alert. Without using Franky, it would have been impossible for Detectives Bartelt and Pedraja to know the intimate details of Mr. Jardines' home without physically entering and performing a traditional search.

4. Highly trained narcotics detection canines are not in general public use.

Highly trained, narcotics detection canines are not in general public use in the way that other sense-enhancing devices are. Narcotics detecting canines have been utilized by law enforcement for many years. *See Place*, 462 U.S at 720 (Brennan, J., concurring) (demonstrating that this Court was addressing law enforcement's use of narcotics detection dogs beginning in the early 1980's). However, while narcotics detection canines may be in general law enforcement use, they are still not in general *public* use.

Moreover, narcotics detection canines are not readily available to the public in the way that a telescope or binoculars would be. Individuals are aware that binoculars and telescopes are in general public use, and thus can take necessary precautions to prevent others from seeing into their homes with these sense-enhancing devices. On the contrary, it can be assumed that narcotics detection canines are not in general public use, since there are no uniform standards of training for the dogs or standards regarding what they can detect. *See* Lunney, *supra*, at 836-37. Additionally, narcotics detection canines are not trained to sniff search the exterior of homes to discern whether or not there is contraband on the *interior* of the home. *Id.* Therefore, it can hardly be said that this practice is common-place. *See id.* Thus, it would be unreasonable to require individuals to protect their homes from invasion from things they do not even know can penetrate the walls of their homes. It would also be contrary to the spirit of the Fourth Amendment.

Applying the factors this Court laid out in *Kyllo*, it is apparent that highly trained, narcotics detection canines are forms of sense-enhancing technology, the use of which on a home constitutes a "search" under the Fourth Amendment.

C. Franky Performed an Unconstitutional Search When He Physically Trespassed onto the Curtilage of Mr. Jardines' Home.

The dog sniff search of Mr. Jardines' home also constitutes a "search" because Franky and Detectives Bartelt and Pedraja intruded onto the curtilage of Mr. Jardines' home. When the government obtains information by physically intruding on a constitutionally protected area, it is undoubtedly a search under the Fourth Amendment. *Jones*, 132 S. Ct. at 960 n.3 (holding that attaching a tracking devise to the undercarriage of a vehicle is a "search"). In *Jones*, this Court resurrected the original protections of the Fourth Amendment, stating that "for most of our history the Fourth Amendment was understood to embody the particular concern for government trespass upon the areas . . . it enumerates." *Id.* at 950. While the issue in *Jones* dealt with an "effect" and not the home, the Court specifically stated that this principle would also apply to the curtilage of a home. *Id.* at 953 (stating that "an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment") (internal citations omitted). Therefore, a physical intrusion onto the curtilage of the home is a "search" in the same way a physical intrusion into the home is a "search." *United States v. Dunn*, 480 U.S. 294, 300 (1987).

"The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection . . . as was afforded the house itself." *Id.* The central consideration in determining whether or not something is included in curtilage is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301. Yet, four factors are particularly useful in making this determination: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.*

Using the factors outlined in *Dunn*, it is apparent that the alcove containing Mr. Jardines' front door was part of the curtilage of his home and therefore should be afforded the same protection as his home. First, the front door is not merely adjacent to the home, it the threshold of the home. Nothing could be more intimately tied to the home. Second, the front door was included within an enclosure of the home. Although it was visible to the public, it was contained within an archway, a type of enclosure. (J.A. 44-45.) This indicates that the area immediately surrounding the front door was within an enclosure surrounding the home. Third, the nature of the front door is exceedingly private. As stated above, it is the threshold to the home. Who goes in or out, and at what hours are certainly intimate details of the home that one expects to maintain as private.[3]

Lastly, Mr. Jardines retained the ability to exclude others from this area, even though it was visible to the public. The front door is intimately tied to the home itself, despite its visibility from a public space. While things like a front door, walkway, or driveway are visible to the public, individuals retain the right to exclude members of the public from those areas. "An individual does not expect the public to be readily present on the porch outside the door to a home." *Florida v. Rabb*, 920 So. 2d 1175, 1187 (Fla. Dist. Ct. App. 2006). One may expect a neighbor or the postman to approach the front door of a home, but no individual would reasonably expect several police officers to walk up to the front door with a highly trained, narcotics detection canine, as happened here. Since the officers and Franky were not acting as

[3] Even though the front door of a home is visible to the public, individuals still have an expectation of privacy in this area. Although individuals do not have an expectation of privacy when they take their cars on to a public road, Justice Alito stated, "society's expectation has been that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring). Accordingly, one does not anticipate law enforcement or others would catalogue who goes in or out of their home, even if this is in "plain sight."

reasonable visitors, Mr. Jardines would likely have excluded them, as anyone would seek to exclude his home from prying eyes and noses.

Taken together, all these factors demonstrate that the area immediately surrounding Mr. Jardines' front door was a part of the home's curtilage. Therefore, Franky and the officers' physical intrusion onto this area constituted a "search" in violation of the Fourth Amendment.

II. A DOG SNIFF OF THE AIR OUTSIDE A PRIVATE RESIDENCE IS NOT A MINIMALLY INVASIVE SEARCH, AND THUS STILL REQUIRES PROBABLE CAUSE TO INITIATE.

A dog sniff search of a home is a "search" under the Fourth Amendment that requires a warrant supported by probable cause. The Fourth Amendment protects people against unreasonable searches and seizures by requiring a warrant, supported by probable cause, to be granted for a search or an arrest under reasonable circumstances. U.S. Const. amend. IV. "Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The probability of criminal activity, not a prima facie showing, is sufficient to establish probable cause. *Id.* at 235. This Court has repeatedly said that a warrant, supported by probable cause, is an essential safeguard against improper searches. *See, e.g., Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979). The essential protection of the warrant requirement is "'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Gates*, 462 U.S. at 240 (quoting *Johnson v. United States,* 333 U.S. 10, 68 (1948)). Nowhere are Fourth Amendment protections stronger than in one's home. *Payton*, 445 U.S. at 589. Therefore, if the probable cause standard applies anywhere, it applies to a home.

A. Allowing Reasonable Suspicion as the Basis for a Warrantless Search of a Home Would Erode the Intended Protections of the Fourth Amendment.

A dog sniff search of a home should be supported by a warrant issued on the basis of probable cause. This requirement would ensure that such searches of a private residence are based on corroborated circumstances, detailed investigations, and reliable informants. While crime, even within a private residence, is of grave concern, "the right of officers to thrust themselves into a home is also a grave concern." *Johnson*, 333 U.S. at 14 (holding that a search of the defendant's home for evidence of drug use required a warrant based on probable cause). The Fourth Amendment protects an individual's right to "dwell in reasonable security and freedom from surveillance" while allowing officers to effectively access the criminal wrongdoing on a proper showing of persuasive evidence. *Id.* An officer's uncorroborated hunch concerning potential criminal activity is not sufficient to justify an invasion into the sanctity of the home. *Id.* The informed determinations of disinterested magistrate judges concerning what is permissible under the Constitution are preferred over the adrenaline fueled decisions of law enforcement officers. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (holding that a search for papers, solely to be used as evidence for a conviction, was unconstitutional). The warrant process serves to preserve liberty by protecting against all general searches by creating a more just and efficient legal process. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). If law enforcement officers are excused from the constitutional duty of obtaining a warrant for the search of a home, it is difficult to think of a case where a warrant should be required.

The home is expressly protected in the Fourth Amendment and a person has the most heightened expectation of privacy within their home. Permitting a warrantless dog sniff search of a home would effectively eviscerate the protections of the Fourth Amendment. "One

governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Mun. Ct. of the City and Cnty. of San Francisco*, 387 U.S. 523, 528-29 (1967) (citations omitted). The physical entry of the home is the chief evil against which the Fourth Amendment aims to prevent. *Payton*, 445 U.S. at 585. Allowing law enforcement to bypass the warrant process would extensively intrude on the sanctity of the home. Therefore, to allow a warrantless search of a home would effectively nullify the Fourth Amendment.

Furthermore, a dog sniff search of a home revels more than just the presence or absence of contraband. Studies show that drug detection dogs alert to by-products of the drug, rather than the drug itself. *See* Lunney, *supra*, at 839-40. For example, narcotics detection canines do not actually alert to the presence of cocaine, instead they alert methyl benzoate, one of the by-products of cocaine. *Id.* Methyl benzoate is also found in numerous household products, including solvents, insecticides and perfumes. *Id.* In fact, drug detection dogs falsely alert to these, non-contraband items between 12.5% and 60% of the time. *Caballes*, 543 U.S. at 412 (Souter, J., dissenting). Therefore, narcotics detection canines do not only reveal the presence or absence of contraband, they also reveal the presence of certain legal household items as well. Here, since Franky is trained to detect cocaine, he may have actually alerted to lawful household items in Mr. Jardines' home. (J.A.13.) Significantly, Franky has only positively alerted to the presence of narcotics in 60% of the cases he has worked. (J.A. 13.) If law enforcement has the ability to detect non-contraband items on less than probable cause, they are conducting general investigatory searches on less than probable cause, which this Court had never permitted.

Without a showing of probable cause, the potential for abuse in obstructing Fourth Amendment protections is substantial. If a search of a home by a highly trained narcotic detection canine is permissible without a warrant, officers could take advantage of the system by roving the streets aimlessly with these canines, waiting for the dogs to alert to anything simply as a pretext to gain entry into a home. This would render almost every American vulnerable to a physical invasion of their home at any time, which is the precise evil the Fourth Amendment is intended to protect against. *United States v. United States District Court*, 407 U.S. 297, 312-13 (1972).

B. A Dog Sniff Search of a Home Is Not One of the Limited Circumstances Where a Search Based on Less Than Probable Cause Is Permitted.

In *Terry v. Ohio*, this Court permitted law enforcement officers to conduct limited warrantless searches on a level of suspicion less than probable cause. 392 U.S. 1, 22 (1968). This Court established "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. Although this Court has upheld searches on less than probable cause, it has not done so because they are designated "minimally intrusive" searches. *United States v. Colyer*, 878 F.2d 469, 477 (D.C. Cir. 1989). In fact, this Court has stated "that the Fourth Amendment knows no search but a 'full-blown search." *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 328 (1987)).

This Court has emphasized the narrow application of the exception to probable cause, stating that *Terry* cannot be understood as supporting "any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). In the limited circumstances in which *Terry* has been applied, the Court has upheld a search "where a careful balancing of

governmental and private interests suggests that the public interest is best derived by a Fourth Amendment standard of reasonableness that stops short of probable cause." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

This case does not involve one of the limited circumstances where reasonable suspicion is sufficient to justify a warrantless search. "The Framers of the [Fourth] Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). The courts are only entitled to substitute their balancing of interests for that of the Framers when exceptional circumstances, beyond the normal needs of law enforcement, make the warrant and probable-cause requirement impractical. *Id.* In no case has this Court held that a search for "evidence *qua* evidence" is a special circumstance that would render the Fourth Amendment warrant requirement impracticable. *Colyer*, 878 F.2d at 478. A warrantless search for evidence as evidence is precisely what occurred in this case. Here, officers were engaged in an investigation for general criminal activity which, absent exigent circumstances, has never been upheld on anything less than probable cause.

1. There is no special circumstance to justify a search of a home by a highly trained, narcotics detection canine based on anything less than probable cause.

Absent exigent circumstances, there are no special needs by law enforcement sufficient to override the warrant requirement. *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). Only "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)). In so holding, this Court has refused to disregard the Fourth Amendment to make law enforcement more efficient.

Mincey, 437 U.S. at 393 (holding that a warrantless search of a murder scene, absent exigent circumstances, was inconsistent with the Fourth Amendment). "The Fourth Amendment reflects the view . . . that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Id.* However, this Court has reasoned that when the press of time requires a law enforcement officer to make a split-second decision in the field, obtaining a warrant may be infeasible. *Terry*, 392 U.S. at 20.

In *Terry*, the police officer's safety interest required taking immediate steps to assure that the person that he was dealing with was not armed. *Id.* at 23. When an officer reasonably believes the person he is investigating poses a safety threat to the officer or to others, it would "be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is carrying a weapon." *Id.* This Court, in *Adams v. Williams*, relied on this safety rationale to uphold a frisk at a brief investigative stop of an individual suspected to have weapons. 407 U.S. 143, 145-47 (1972). The Court noted that "the purpose of this limited search [for weapons] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Id.* at 146.

In this line of cases, immediacy in the interest of safety rendered the warrant and probable cause requirement impractical. However, in the instant case, there was not a "special need" by law enforcement that would justify searching the home without a warrant. Determining whether drugs are in fact inside a residence is never an immediate public safety concern. In *Johnson*, officers smelled burning opium and subsequently entered the defendant's hotel room, arrested the defendant, and performed a search for drugs. 332 U.S. at 11-13. This Court held that inconvenience and delay were not exceptional circumstances sufficient to justify the failure of the officers to obtain a search warrant. *Id.* at 15.

Here, there was no split-second calculation required by law enforcement, or governmental interest other than inconvenience and delay, that would have made obtaining a warrant impossible. Even if the police suspected that the dog sniff search would reveal the detection of narcotics within the home, they could not have reasonably believed that absent an immediate search, there was substantial risk of harm to officers or persons involved. Moreover, "there is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found." *Colyer*, 878 F.2d at 478 (internal citations omitted). Additionally, by waiting over a month between receiving the tip and conducting the dog sniff search of Mr. Jardines' home, the law enforcement officers passed up a reasonable opportunity to obtain evidence to support a warrant. (J.A. 8.) In fact, the officers could have initiated the warrant process in the time between setting up surveillance and beginning the dog sniff search. Accordingly, it appears time was not of the essence to these officers. Furthermore, the anonymous tip in this case did not allege that anyone was armed at the residence. (J.A. 8.) In fact, the surveillance of the home revealed no unusual activity or persons visiting the home. (J.A. 9.) The residence was not a sale house nor was there any drug related activity in the area. (J.A. 9.) There was no threat, immediate or otherwise, to public safety that would justify searching the home without probable cause. Therefore, the failure of the officers to obtain a warrant supported by probable cause cannot be excused.

Petitioner alleges that requiring probable cause for a dog sniff search would render the dog sniff search irrelevant because a showing of probable cause would allow officers to obtain a search warrant to search the whole home. However, this argument is unfounded. A warrant based on probable cause for a dog sniff search is based on different findings than a warrant for a physical search of a premise. This is illustrated by the fact that thermal-imaging scans have not

become obsolete after *Kyllo*. For example, warrant applications for thermal-imaging searches (post-*Kyllo*) have been based on "whether there is probable cause to conduct the scan, not on whether there is probable cause to physically search the premises." Lunney, *supra*, at 891. As stated earlier, dog sniff searches are analogous to a thermal-imaging scan of a home. Lunney, *supra*, at 839-40. Accordingly, requiring probable cause for a dog sniff search would not render the dog sniff search irrelevant.

2. An individual's privacy interest in one's home outweighs the governmental interest in this case.

The search of one's home is not so minimally intrusive as to justify a search based on anything less than probable cause. As mentioned earlier, "'the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo*, 533 U.S. at 31 (quoting *Silverman*, 365 U.S. at 511). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31 (citations omitted).

In *T.L.O.*, the Court held that school officials are not held to the requirement that there be probable cause when performing a search of a student. 469 U.S. at 340. The special needs of school officials in maintaining an orderly environment and implementing disciplinary procedures permits searches supported by reasonable suspicion. *Id.* at 341. However, a search of a private home by a highly trained, narcotics detection canine is not a unique environment which justifies a search based on reasonable suspicion. In *T.L.O.*, this Court emphasized the importance of teachers and school administrators to be able to closely regulate the school environment through flexible disciplinary procedures. *Id.* at 339-40. The home environment is not analogous to a school setting. There is no standard of maintaining order in a neighborhood which outweighs the

privacy interest expected by a homeowner on their own property. Accordingly, reasonable suspicion is not sufficient to justify a dog sniff search of a home.

Mr. Jardines' strong privacy interests significantly outweigh the government's interest in general crime detection. Even if the government had a legitimate interest in conducting the search, an individual's privacy interest within the home would render the government's interest useless unless supported by a warrant and probable cause. Additionally, the officers offered not reasons for bypassing the warrant process. The only plausible explanation for the officers' failure to obtain a warrant is that the process was inconvenient and timely. However, "these are never . . . convincing reasons and . . . certainly not enough to bypass the constitutional requirement." *Johnson*, 333 U.S. at 15.

3. Since the anonymous tip in this case lacked the indicia of reliability, the officers lacked probable cause to perform a dog sniff search of Mr. Jardines' home.

In determining whether an anonymous tip can provide probable cause, courts must look at the totality of the circumstances, specifically considering the informant's veracity, reliability, and basis of knowledge. *Gates*, 462 U.S. at 230-31 (1983). The anonymous tip in the instant case gave no basis for the informant's knowledge, nor did it provide detailed facts that could be corroborated by the officers. Therefore, it lacked any indicia of reliability and could not form the basis for probable cause. Without more than the uncorroborated, anonymous tip, the government lacked sufficient evidence to support the dog sniff search of Mr. Jardines' home.

In *United States v. Kattaria*, the court upheld a search warrant for a thermal-imaging scan of a suspected grow residence. 552 F.3d 1171, 1175 (8th Cir. 2009). The warrant was challenged on the basis that it was not supported by sufficient probable cause. *Id.* at 1175-76. The court concluded that the thermal imaging search was supported by probable cause because

the information provided by the cooperating defendant established the basis for the investigation and was corroborated in part by the officer. *Id.* at 1176. In *Kattaria*, the cooperating informant was not anonymous, he was an acquaintance of the defendant, had visited the residence, and had seen the grow operation. *Id.* at 1174. Additionally, the informant provided information concerning the defendant's criminal history which was corroborated by the investigating officer. *Id.* Furthermore, a check of utility records revealed abnormally high electricity consumption which is indicative of a marijuana growing operation. *Id.* The court held that this information, taken together, was sufficient to support a finding of probable cause. *Id.* at 1176.

The tip in the instant case is distinguishable and lacks any indicia of reliability. Accordingly, there was not enough evidence to support a dog sniff search based probable cause. In the instant case, the tipster was anonymous and did not reveal any information beyond the address of the alleged grow residence. (J.A. 8.) While the police officer noticed the blinds were closed and the air conditioning was running, (J.A. 9), closing ones blinds to protect ones privacy should not be taken as suspicious behavior indicative of a grow operation. Furthermore, Detective Pedraja did not notice the air conditioning running until after the canine search had been executed. (J.A. 36.) Probable cause must be established before conducting the search. *See Mincey*, 437 U.S. at 390. Therefore, absent corroborating circumstances or more detailed information, there was insufficient information to obtain a warrant for the dog sniff search of Mr. Jardines' home based on probable cause.

4. Even if the standard to initiate a dog sniff search were reasonable suspicion, an anonymous tip without corroboration would still be insufficient.

Even in the few cases in which *Terry* has been applied, an anonymous tip alone was not sufficient to establish reasonable suspicion. In *Terry*, this Court determined that in order to

conduct a frisk, officers must be able to address "specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant an intrusion." 392 U.S. at 21. Examining the "totality of the circumstances" is essential in determining whether an anonymous tip provides reasonable suspicion, sufficient to justify a search of a citizen. *Alabama v. White*, 496 U.S. 325, 330 (1990). The guiding principle in determining the appropriateness of an investigatory detention is "the reasonableness in all the circumstances of the particular governmental invasions of a citizen's personal security." *Terry*, 392 U.S. at 19. "Reasonable suspicion . . . is dependent upon both the content of information possessed by police and its degree of reliability." *White*, 496 U.S. at 330. An informant's "veracity," "reliability," and "basis of knowledge" are highly relevant when analyzing the totality of the circumstances in determining whether an anonymous tip justified reasonable suspicion of criminal activity. *Id.* at 328.

In *White,* a law enforcement officer stopped defendant's vehicle to search for drugs after an anonymous tip notified the police that the defendant was in possession of cocaine. *Id.* at 327. The anonymous tip described the defendant's vehicle in detail and provided the defendant's name, location and details about where the defendant was going. *Id.* The court held that the anonymous tip, which was corroborated by the police, provided reasonable suspicion to justify a search of the defendant's car. *Id.* at 326-27. However, the court noted that the tip alone lacked the necessary indicia of reliability to justify a search. *Id.* at 329. The court held that "'the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.'" *Id.* at 330 (quoting *Gates*, 462 U.S. at 245).

The anonymous tip in the instant case lacks the indicia of reliability to support a search based on reasonable suspicion. The anonymous tip did not provide any details about the resident or the home which could be corroborated by the police. (J.A. 16, 109.) The tipster simply provided allegations concerning an address, without ever mentioning Mr. Jardines. (J.A. 16, 109.) The tip provided no information that could be corroborated without an invasion into the privacy of Mr. Jardines' home. Furthermore, the search in *White* was of a car and, as stated earlier, there is a heightened expectation of privacy within the home which would require a showing of stronger reliability. Finally, the additional information concerning the blinds and the air conditioner are not indicative of criminal activity. Closing one's blinds is an innocuous act that does not rise to the level of reasonable suspicion. Furthermore, the running of the air conditions was not detected until after the dog sniff search had been executed. (J.A. 36-38.) "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000). As such, a court should not consider Detective Pedraja's observations after the sniff search was conducted.

An anonymous telephone tip without additional conduct clearly attributable to criminal activity lacks sufficient indicia of reliability to provide reasonable suspicion. Here, all the officers had to go on in this case was the bare report of an unknown informant who failed to explain how he knew about the grow operation. Accordingly, the officers lacked reasonable suspicion, let alone probable cause, to support the search of Mr. Jardines' home.

CONCLUSION

Individuals have the most heightened expectation of privacy in their home, and thus anything that reveals the details of the interior of the home, contraband or otherwise, infringes on individuals reasonable expectation of privacy. Narcotics detection canines, like Franky, are

highly trained sensory-enhancing instruments, that when used on a home, constitute a search. Furthermore, in this case, Franky and the officers physically invaded Mr. Jardines' property, and therefore conducted a search in violation of the Fourth Amendment. Using either the factors established in *Kyllo* or *Jones* to determine when a search has occurred, Franky's and the officer's conduct here infringed upon Mr. Jardines' reasonable expectation of privacy, and therefore was an unreasonable, and thus unconstitutional, search under the Fourth Amendment.

Moreover, because of the sacred status the home has in Fourth Amendment jurisprudence, a warrantless dog sniff search of a home must require probable cause to initiate. Physical entry into the home requires a warrant supported by probable cause or exigent circumstances, neither of which were present in this case. Since a dog sniff search reveals the intimate details of the interior of the home, it should also require probable cause and a warrant. Any governmental interest in general crime prevention is outweighed by the long-standing and unwavering sanctity of the home. Any other result would render individuals vulnerable to police abuse and a physical invasion of their home at any time, both of which the Fourth Amendment aims to prevent.

Dated: October 16, 2012

Respectfully Submitted,

Kaitlin Keohane
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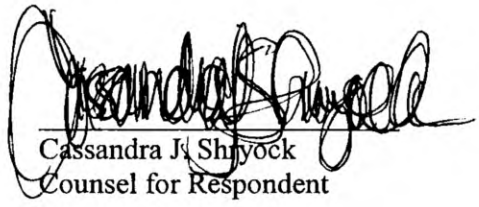

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